IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.4056 OF 1994

Miss Sahila Vimal Chadha, daughter of late Vimal Chaddha, Flat No.3, Shiv Niketan, 18th Road, Khar, Bombay-400 052. .... Petitioner

- Versus -

1. Mrs. Louisa Mathilda Drego, since deceased, 26, Pali Village, Bandra, Bombay-50.

And

2. Owen Francis Drego, residing at 26, Pali Village, Bandra (West), Bombay-50. .... Respondents

Shri S.P. Kanuga for the Petitioner.

Sarvasri R.A. Thorat with V.A. Sugdare for the Respondent No.2.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: DECEMBER 05, 2005

ORAL JUDGMENT:

1. Heard. The petitioner challenges the order dated 2-9-1994 passed in Interim Notice No.1534 of 1993 in R.A.E. Suit No.1176 of 1991 by the Court of Small Causes at Mumbai. By the impugned order, the trial Court has allowed the application filed on behalf of the respondent for amendment in order to bring on record the respondent in place of the deceased plaintiff.

2. Few facts relevant for the decision are that one Mrs. Louisa Mathilda Drego filed R.A.E. Suit No.1176 of 1991 in her capacity as the landlady of the premises comprising of Room No.25-A, East Pali, situated at Bandra, Mumbai for eviction of the petitioner from the suit premises on the various grounds stated in the plaint. During the pendency of the suit, the plaintiff expired on 22-7-1993. An application was moved by the respondent Owen Francis Drego to permit him to delete the name of the original plaintiff and to substitute his name in her place, which was objected to by the petitioner. The trial Court by the impugned order, in exercise of powers under Order 22, Rule 3 read with Order 6, Rule 17 of the Code of Civil Procedure, 1908, hereinafter called as "the C.P.C." allowed the said application and directed the amendment to be accordingly carried out.

3. The impugned order is challenged on three grounds: firstly, that the application which was filed by the respondent Owen Francis Drego was on the basis of a deed of gift and claiming to be a transferee of the subject-property on the strength of the said deed of gift and based thereon he had claimed to be the legal representative of the deceased plaintiff to represent her estate. At the same time, the contents of the application disclose that the plaintiff ceased to be the owner of the suit premises as far back as 22-6-1973 and

the property was gifted to her son by name Walston Drego. As the suit was filed merely in the capacity as the rent collector i.e. landlady, there was no estate as such left for being represented by any legal representative in relation to the suit in question and, therefore, the application could not have been allowed in exercise of powers under Order 22, Rule 3 of the C.P.C. Secondly, even assuming but without admitting that the suit property was the estate of the deceased plaintiff, the records disclose that there are about six legal heirs of the deceased plaintiff to the knowledge of the respondent and yet no steps are taken to bring those legal heirs on record and therefore the suit abates. Reliance is sought to be placed in the decision of learned single Judge in the matter of **Parvez Rustom Nekoo v. Rustom Ardeshir Nekoo,** reported in 2003 (2) Mh.L.J. 236. Thirdly, it is the contention on behalf of the petitioner that the trial Court without considering the materials on record in the manner it ought to have been considered and without holding proper inquiry to ascertain whether there was any estate as such left behind to be represented in relation to the suit in question and without considering whether right to sue survives in favour of the respondent Owen as being the legal heir of the plaintiff or any right having been assigned on the strength of any document which would entitle the respondent to come on record and continue the proceedings as the plaintiff, the trial

Court merely on the assumption that the respondent Owen is the legal heir of the deceased plaintiff, allowed the application under Order 22, Rule 3 of the C.P.C.

4. The impugned order is sought to be defended on behalf of the respondent while contending that the suit was not filed merely in the capacity as the rent collector but as the owner of the property and the respondent as the son of the deceased plaintiff has right to continue the suit as the right to sue survives upon him and merely because the other co-owners, even assuming that there are co-owners, they are not brought on record as the legal representatives, it cannot defeat the right of the respondent to continue the proceedings and in that regard reliance is sought to be placed in the decision of the Apex Court in the matter of **Pal Singh v. Sunder Singh (dead) by Lrs. and others,** reported in AIR 1989 SC 758.

5. Upon hearing the learned Advocates for the parties and on perusal of the records, as already observed above, the impugned order has been passed clearly in exercise of powers under Order 22, Rule 3 of the C.P.C. Indeed, perusal of the impugned order clearly discloses that the trial Court has held that the respondent is claiming his right on the basis of the gift deed stated to have been executed by the deceased plaintiff in favour of her son Walston Drego and further by the heirs

of the said Walston Drego in favour of the respondent and that no other person, including another brother of Walston Drego by name Teddy Drego has claimed any right to the suit property. At the same time, the trial Court has also observed that the respondent is claiming his right as landlord of the petitioner in the suit for eviction of the petitioner on the ground that the petitioner has acquired another suitable accommodation. After these observations, the trial Court considering that under Order 22, Rule 3 of the C.P.C. the Court has merely to consider whether the right to sue survives or not and whether the estate of the plaintiff is properly represented or not and in those circumstances there is no need to peruse the documents sought to be relied upon and since the application was filed within ninety days from the death of the plaintiff, the same has been allowed.

6. Undoubtedly, under Order 22, Rule 3 of the C.P.C., when the plaintiff expires and the right to sue survives and in that regard application is made, the Court should allow the legal representatives of the deceased plaintiff to be made parties to the suit and allow them to proceed with the suit, albeit the application has to be filed within the period prescribed under the law. Evidently therefore, in case an application under Order 22, Rule 3 is to be considered, it is to be established that the right to sue survives and the applicant or

applicants, as the case may be, are the legal representative/s within the meaning of the said expression under Section 2(11) of the C.P.C. Whenever there is any objection to such an application, it would be the duty of the Court to analyse whatever material that is placed on record by the applicant as well as the opponent in support of their rival contentions and to ascertain whether in the case pleaded in the plaint and revealed from the records right to sue survives or not. Once the Court finds the right to sue survives, obviously the Court will have to also consider whether the applicant is or the applicants are, as the case may be, the legal representative/s of the deceased plaintiff.

7. The right to proceed with the suit can also be acquired in terms of Rule 10 of Order 22 when there is a case of assignment, creation or devolution of interest during the pendency of the suit.

8. In the case in hand the Court below without analysing the materials on record and without ascertaining as to whether the right to continue with the suit, as claimed, and the right to sue survives in the facts and circumstances of the case or not, and whether the respondent is the legal representative within the meaning of the said expression for the purpose of bringing on record in exercise of powers

under Order 22, rule 3 of the C.P.C., whether there has been devolution of interest in the property in the subject matter of the suit in favour of the respondent, the Court below merely by recording various contentions of the respondent and merely reproducing the points which are required to be considered while exercising the powers under Order 22, Rule 3, allowed the application simply recording that the same has been filed within ninety days and would not prejudice the defendants. This apparently shows clear case of failure to exercise jurisdiction in the manner which was required to be exercised while dealing with the application which is filed for exercise of powers under Order 22 of the C.P.C.

9. In the facts and circumstances of the case, therefore, the learned Advocate appearing for the petitioner is justified in contending that the impugned order does not disclose proper application of mind to the issue which ought to have been considered while dealing with the application which was filed by the respondent consequent to the death of the original plaintiff. In the circumstances, therefore, it would be necessary to set aside the impugned order and to remand the matter to the trial Court to deal with all the above issues before arriving at any final conclusion as regards the entitlement of the respondent to continue with the proceedings. It would be also necessary for

the Court below to decide as to in what capacity the respondent is required to be brought on record in place of the original plaintiff before the application filed by him is being allowed. It is only after considering all these issues that the Court should pass a reasoned order in that regard. Mere reproduction of the questions which are required to be dealt with under Order 22, Rule 3 of the C.P.C. and the contentions on behalf of the parties, that would not constitute the reasoning to justify the finding for allowing a party to continue with the proceedings on the death of the sole plaintiff.

10. In the circumstances, it will be premature for this Court to deal with the other issues sought to be raised in the matter and for the same reason, therefore, it is not necessary to refer to the decisions sought to be relied upon in the matter. The parties can agitate all those issues before the Court below and the said Court will have to consider all those issues in accordance with the provisions of law.

11. For the reasons stated above, therefore, the impugned order is hereby set aside and the matter is remanded to the Court below to consider the application filed by the respondent in the Interim Notice No.1534 of 1993 afresh in accordance with the provisions of law and bearing in mind the observations made hereinabove.

Considering that the application of the applicant relates to the year 1993 and the suit relates to the year 1991, the Court below is expected to dispose of the matter as expeditiously as possible and in any case prior to 31-3-2006. The rule is made absolute accordingly with no order as to costs.